IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 23 OF 2005

Ryan s/o Paul Fernandes
Presently in judicial
custody at Sada Jail,
Vasco da Gama, Goa. ... Applicant

versus

1. The State of Goa
   i/o Vasco City Police Station.

2. Francisco @ Francis Gregorio
   Paul D'Sa
   Presently in judicial custody,
   Vasco.

3. Rajendra @ Rajan Singh,
   Presently in judicial custody,
   Vasco.

4. Sachin Parab
   s/o Vishnu Parab
   Presently in judicial custody,
   Vasco. ... Respondents

Mr. Dhiraj U. Mirajkar, Advocate for the Applicant.

Ms. W. Coutinho, Public Prosecutor for the Respondent No.1.

CORAM : N. A. BRITTO, J.

DATE : 22ND DECEMBER, 2005.

ORAL ORDER

This revision petition is directed against the Order dated 24-8-2005 of the learned Sessions Judge, Margao. Some facts are required to be stated to dispose of this revision petition.

2. The petitioner is accused no.1 in Sessions Case No.15 /2005 pending for trial before the learned Sessions Judge, Margao. Mr. Pratham Gadagkar is accused no.5 in the said Sessions Case. Incidentally, the petitioner who is accused no.1 is the son-in-law of the deceased Dr. Verenkar and the said Sessions Case has been filed against the petitioner and other accused with an allegation that all the accused conspired together and on or about 17-1-2005 at about 06.15 hours the said accused abducted the deceased Dr. Verenkar and subsequently caused his death. In the course of investigations, a statement under Section 164 of the Code of Criminal Procedure (Code, for short) of the said accused no.5/Pratham Gadagkar was recorded by the Special Judicial Magistrate on seven occasions in February, 2005. In fact, one does not know as to

why the learned Special Judicial Magistrate had to adjourn the recording of the said statement on seven different dates. In case, the limited timings allotted to him came in his way, he should have made necessary arrangements and ensured that the statement was recorded and completed on same date. On 23-6-2005 the said accused no.5/Pratham Gadagkar filed an application stating that he had co-operated with the Investigating Agency and had confessed about his involvement in the said offence and that he also wanted to make a true statement before the Court and, therefore, he be tendered pardon as he wished to become an approver. The said application was marked for the say of the Public Prosecutor who on or about 14-7-2005 gave her say on the said application and in the said say, the learned Public Prosecutor mentioned that the contents of the application were verified with the Investigation Officer and that the statement of accused no.5/Pratham Gadagkar could be recorded on condition that he discloses the whole truth and consequently it could be considered whether tender of pardon is to be granted to him or otherwise. Upon the perusal of the said say as well as the confessional statement of the said accused, the learned Sessions Judge proceeded to tender

pardon to accused no.5/Pratham Gadagkar in terms of Section 307 of the Code, observing that the case was based entirely on circumstantial evidence and, therefore, it would be a fit case to tender pardon to the accused on a condition that he makes a true disclosure of the whole circumstances within his knowledge relating to the crime and of every person concerned, whether as a principal or abettor in the commission of the offence.

3. Mr. Mirajkar, the learned Counsel appearing on behalf of the petitioner/A-1 has made two submissions. Firstly, Mr. Mirajkar has submitted that on or about 2-5-2005 the said A-5/Pratham Gadagkar had submitted an application to the Chief Judicial Magistrate at Vasco da Gama enclosing therein three sets of applications filed by him earlier stating that he wanted to change the statement earlier given by him under Section 164 of the Code and that in his application dated 23-6-2005 to the learned Sessions Judge accused no.5/Pratham Gadagkar had suppressed the fact of making the said application along with other three applications and thereby obtained the said Order dated 24-8-2005 by fraud. Mr. Mirajkar has submitted that the impugned Order dated 24-8-2005 of the learned Sessions Judge

is obtained by A-5/Pratham Gadagkar by fraud by suppressing the said application dated 2-5-2005 and also the application dated 23-6-2005/6-8-2005. Mr. Mirajkar has placed reliance on the case of **MCD** v. **State of Delhi and another**((2005) 4 SCC 605.

4. Notice having been given to A-5/Pratham Gadagkar, A-5/Pratham Gadagkar was produced before this Court and he presented an application signed before the Jailor on 11-11-2005. As regards the application dated 2-5-2005 and three other applications annexed to it, A-5 has stated that Advocate Shri Shantanu Salgaokar had taken his signatures in the Open Court of Judicial Magistrate, First Class, Vasco da Gama in front of escorts(wrongly spelt as scords) whose name he did not know, stating that that was the Vakalatnama of Bail Application on which his signatures were being taken and that was done inspite of the fact that the escorts(scords) was having an objection. Regarding the application signed on 23-6-2005/6-8-2005 he stated that the petitioner had taken his signature on one more application in the Court of Sessions, Margao stating that it was a request being made to put up their case before the Fast Track

Court and that is what A-4(Sachin Parab) had told him in front of him before he had signed the said application. As far as this application dated 23-6-2005/6-8-2005 (the first date has been struck off) the Investigation Officer in his reply filed before this Court has stated that the Petitioner had obtained the signatures of all the five accused including the approver only on the last page with ulterior motive and to create false grounds. According to him, the said application although dated 23-6-2005 was moved only on 6-8-2005 after making corrections on the last page and only after A-5/Pratham Gadagkar(approver) had moved the application for pardon before the Sessions Court, Margao on 23-6-2005.

5. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get and advantage. As per Black's Legal Dictionary, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by

words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. The case of **MCD** v. **State of Delhi and another**(supra) was a case where the accused was granted the benefit of probation under Section 4 of the Probation of Offenders Act, 1958 and the said benefit was granted to the said accused without giving an opportunity to the Municipal Corporation(Appellant) to file counter affidavit and without calling a report of the Probation Officer in relation to the conduct of the accused. The accused in that case was earlier convicted and sentenced under Sections 332 and 461 of the Delhi Municipal Corporation Act, 1957 for committing offence of unauthorised construction and, therefore, was a previous convict and he had not disclosed the said fact to the High Court. In other words, the accused in that case had suppressed his previous conviction and thereby had sought the benefit of probation under Section 4 of the Probation of Offenders Act, 1958 and in the background of the aforesaid facts, the Hon'ble Supreme Court, held that when a litigant withholds a vital document or suppresses a material fact in order to gain

advantage in the case such litigant would be guilty of playing fraud on the Court as well as on the opposite party. It is a settled principle that fraud vitiates every solemn act and fraud and justice cannot dwell together. However, the said case of **MCD** v. **State of Delhi and another**(supra) is of no assistance to the case of the Petitioner/A-1. In the case at hand, the said accused/A-5/Pratham Gadagkar in his application to the Court dated 23-6-2005 had clearly stated that he had confessed about his involvement in the offence and his confessional statement was recorded. The learned Sessions Judge observed in the Order that he had gone through the confessional statement of A-5/Pratham Gadagkar given by him before the Special Judicial Magistrate on various dates in which he had given the details about the commission of the present crime showing his involvement. In case there was no statement of A-5/Pratham Gadagkar recorded by the Special Judicial Magistrate and there were only the applications made by him dated 2-5-2005 or for that matter 23-6-2005/6-8-2005 and he had suppressed these applications, in that event A-5/Pratham Gadagkar might have been guilty of committing a fraud and obtaining the said order tendering him pardon. There is no doubt that A-5/Pratham Gadagkar did not refer to the said application dated 2-5-2005 and those accompanying it, as well as application dated 23-6-2005/6-8-2005 in his application for tender of pardon dated 23-6-2005 but that certainly was not done by

A-5/Pratham Gadagkar with a view of deceiving the learned Sessions Judge. In fact, he has given his explanation in the reply filed before the Court under what circumstances the said applications came to be filed. Even if he had disclosed about the said applications, nothing would have prevented the learned Sessions Judge still granting pardon to him, because there was a confessional statement earlier recorded before a Special Judicial Magistrate. Whether the said explanation would be accepted or not in the light of two different stands taken by A-5/Pratham Gadagkar one in his confessional statement and his application dated 23-6-2005 and the other in the said applications which he did not mention before the Sessions Court would be a matter to be assessed and weighed in considering the worth of the evidence which A-5/Pratham Gadagkar would be giving before the Sessions Court as an approver in the said case. Suffice it to say that by not referring to the said applications A-5/Pratham Gadagkar has not committed any fraud nor has he obtained the said order dated 24-8-2005 by practising fraud on the Court of Sessions.

6. The second submission of Mr. Mirajkar, the learned Counsel of the Petitioner/A-1 is that the prosecution did not join the request of A-5/Pratham Gadagkar in his said application dated 23-6-2005. To support this submission, Mr. Mirajkar has placed reliance on the case of **Lt.**

Commander Pascal Fernandes v. **The State of Maharashtra** (1969 Mh.L.J. 865) wherein the Apex Court has stated that ordinarily it is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. But even where the accused directly applies to the Special Judge he must first refer the request to the prosecuting agency and it is for the Special Judge to enter the ring as a veritable director of prosecution. The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency, and must, therefore, be exercised only when the prosecution joins in the request ... The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon would be in the interest of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon and that the Special Judge must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case.

7. Ms. Coutinho, the learned Public Prosecutor has submitted that the entire say given by the Public Prosecutor on 14-7-2005 has got to be considered as a whole and when so considered it shows that the prosecution did not at all object to the request made by A-5/Pratham Gadagkar but

joined the said request though what was stated by the prosecution was that the accused could be granted pardon on the condition that the said accused discloses the whole truth.

8. The learned Public Prosecutor Ms. Coutinho has further submitted before this Court that the prosecution had not opposed the grant of pardon to A-5/Pratham Gadagkar and even now supports the Order of the learned Sessions Judge in granting pardon to the said accused. The Investigation Officer in his affidavit dated 11-11-2005 before this Court has also stated that on 14-7-2005 the Public Prosecutor had called him and after verifying and consulting him had agreed that the accused be made an approver on condition that he discloses the whole truth and the correct facts. Needless to observe the condition that an accused has got to disclose the whole truth and the correct facts is a condition which very much goes with the grant of pardon itself. In the case at hand, the request of A-5/Pratham Gadagkar was referred by the learned Sessions Judge to the prosecuting agency, as contemplated by the Judgment of the Supreme Court in the case of **Lt. Commander Pascal Fernandes** v. **The State of Maharashtra**(supra). There was nothing in the reply/say filed by the Public Prosecutor that the prosecution in any manner opposed the grant of pardon to A-5/Pratham Gadagkar. In other words, the prosecution had no objection

for the grant of pardon to the said A-5/Pratham Gadagkar and the only condition put forward by the prosecution was that the Court should be satisfied and that the said accused should disclose the whole truth. There is nothing in the said reply/say of the learned Public Prosecutor to suggest that the prosecution had not joined the request of A-5/Pratham Gadagkar in his application dated 23-6-2005 for tendering pardon to him. In the light of the above, the second submission fails.

9. As regards the maintainability of this revision petition no objection was taken on behalf of the Respondents and the learned Counsel Mr. Mirajkar has referred to a Judgment of this Court in the case of **Maosi Nainsi Jain and others** v. **State of Maharashtra**(1985 CRI.L.J. 1818) wherein this Court has held that an order passed under Section 306 is not an interlocutory order and, therefore, a revision against such an order is maintainable. The same principle has also to be applied to an order made under Section 307 of the Code as well.

10. In the light of the above, I find that there is no merit in this revision and, therefore, the same is hereby dismissed.

N. A. BRITTO, J.

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